SRI HARTAMAS DVPT. SDN. BHD.

v.

MBF FINANCE BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 02-274-91]
30 JANUARY 1992

COMPANY LAW: *Statutory demand - Test of Insolvency - Section 218(2) Companies Act 1965.*

Having obtained judgment against the appellant for the sum of RM5,197,060.82, the respondent by letter dated 24 December 1988 served on the appellant on 27 December 1988 a demand under s. 218(2)(a) Companies Act 1965 requiring payment within 21 days of the date thereof. Upon the appellant's failure to pay the debt as demanded, the respondent presented a petition dated 17 January 1989 and the appellant was wound up on the ground that it had failed to comply with a statutory demand and was therefore insolvent and unable to pay its debt.

On appeal it was contended that the demand was bad in law because under s. 218(2)(a), a company is entitled to have three weeks after sevice of the demand and not from the date of the notice.

Alternatively it was submitted that the Court had applied the wrong legal test in determining whether the appellant had rebutted the presumption of insolvency and that the correct legal test would be met by answering the question: "Would the appellant be capable, if necessary, of paying all its debts by a realisation of its assets, including any immovable property and of carrying on some other business if its shareholders so wished out of the net amount so realised after payment of all liabilities?"

Held:

[1] The three weeks stipulated in s. 218(2)(a) Companies Act 1965 refer to the period of neglect to pay before the said presumption of inability to pay debts arises under that said section and is not a requirement relating to the notice of demand itself.

[2] A company may have wealth locked up in investments not presently realizable; but although this may be so, yet if it has no assets available to meet its current liabilities, it is commercially insolvent and may be wound up.

[Appeal dismissed with costs.]

[Bahasa Malaysia translation of Headnote]

UNDANG-UNDANG SYARIKAT: *Tuntutan statut - Test of Insolvency - Seksyen 218(2)(a) Akta Syarikat 1965.*

Penghakiman di beri terhadap perayu untuk jumlah RM5,197,060.82. Responden melalui surat bertarikh 24 Disember 1988 menyampaikan pada perayu pada 27 Disember 1988, satu tuntutan dibawah s. 218(2)(a) Akta Syarikat 1965 supaya membuat bayaran dalam tempoh 21 hari dari tarikh surat itu. Ekoran kegagalan perayu dalam melakukan bayaran seperti yang dituntut,

responden mengemukakan petisyen pada 17 Januari 1989 dan perayu dipergulungkan atas alasan bahawa ianya gagal menepati tuntutan statut dan oleh sebab itu insolvent dan tidak dapat membayar hutang.

Dalam rayuan dipertikaikan bahawa tuntutan itu "bad in law" kerana dibawah s. 218(2)(a), suatu syarikat berhak untuk memakan masa tiga minggu mulai tarikh penyampaian tuntutan dan bukanlah mulai tarikh notis tersebut. Sebagai alternatif, dihujahkan bahawa Mahkamah telah melaksanakan ujian perundangan yang salah dalam menentukan sama ada perayu ada mematahkan anggapan insolvency dan bahawa ujian perundangan yang betul boleh ditetapkan dengan jawapan kepada soalan. "Apakah perayu mempunyai keupayaan jika perlu membayar semua hutang dengan penghasilan aset termasuk mana-mana harta tak alih dan menjalankan lain-lain perniagaan sekiranya pemegang share mahukan daripada jumlah wang yang dihasilkan setelah pembayaran semua lialbiliti-lialbiliti."

Diputuskan:

[1] Tempoh tiga minggu yang disebutkan dalam s. 218(2)(a) Akta Syarikat 1965 rujuk pada masa abaian pembayaran sebelum bangkitnya anggapan tak keupayaan untuk membayar hutang di bawah seksyen itu, dan bukanlah satu keperluan berhubung dengan notis tuntutan itu sendiri.

[2] Mana-mana syarikat mungkin mempunyai harta yang terkunci dalam pelaburan yang tidak dapat penghasilan masa ini, tetapi, walaupun peristiwa ini berlaku dari jika syarikat itu tidak mempunyai aset untuk menampung keperluan lialbiliti semasa, syarikat itu dari segi komersial insolvent dan boleh digulung.

[Rayuan ditolak dengan kos.]

Cases referred to:

Re Yap Kim Kee & Sons Sdn. Bhd. [1990] 2 MLJ 178 ***(cit)***
Bateman Television Ltd. v. Coleridge Finance Ltd. [1969] NZLR 794 637 ***(foll)***
Re Perusahaan Jenwatt Sdn. Bhd. [1990] 2 MLJ 178 ***(cit)***
Re Willies Trading Pty. Ltd [1977-78] 3 ACLR 582 ***(cit)***
Re Ataxtin Pty. Ltd. v. Gordon Pacific Dvpt.Pty. LMT. [1991] 9 Acce 865 ***(cit)***
Parry & Co. Ltd. v. India Machinery Stores Pty. Ltd. [1979] 49 Comp Cas 21 ***(cons)***
Re Catholic Publishing & Book Selling Co. 33 LJ Ch 325 ***(foll)***
Re Lympne Investment Ltd.[1972] 1 WLR 523 ***(cit)***
Malayan Plant (Pte.) Ltd. v. Moscow Narodny Bank Ltd. Appeal [1986] 2 MLJ 53 ***(cons)***
Re Great Eastern Hotel (Pte) Ltd. [1989] 1 MLJ 161 ***(dist)***
Imperial Hydropathic Ltd. Hotel Co. Ltd. v. Hampson 49 LT 1417 ***(foll)***
Re KIeran Byrne & Associates Geotechnical Consultants Pty. Ltd [1987-88] 12 ACLR 367 ***(cit)***
William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. [1991] 1 CLJ (Rep) 492 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 218(2)(a), (c)
Companies Act [Sing], s. 254(2)(c)

For the appellant - G. Sri Ram (with M.S. Murthi); M/s. Murthi & Partners
For the respondent - Loh Siew Cheang (with Ranjit Singh & Aggie Chew); M/s Cheang & Ariff

JUDGMENT

Gunn Chit Tuan SCJ:

On 12 July 1988, MBf Finance Bhd. (hereinafter referred to as "the respondent"), obtained judgment in the High Court at Kuala Lumpur against Sri Hartamas Dvpt. Sdn. Bhd. (hereinafter referred to as "the appellant") for the sum of RM5,197,060.82 together with interest and costs.

By a letter dated 24 December 1988, the respondent sent to the appellant a demand under s. 218(2)(a) of the Companies Act 1965, (hereinafter referred to as "the Act") which reads as follows:

> Statutory Demand Pursuant To s. 218 of the Companies Act 1965 (Act 125) For Payment Of A Debt
>
> To: Sri - Hartamas Dvpt. Sdn. Bhd.
> 3rd Floor
> Wisma Low Kim Her,
> 225-227, Jalan Tun Sambanthan
> 50470 Kuala Lumpur
>
> Take Notice that, We, Messrs Cheang & Ariff of 18th Floor, Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur, solicitors for MBf Finance Bhd hereby require you to pay to us the principal sum due on a final judgment dated 12 July 1988 obtained by MBf Finance Bhd against you in the High Court at Kuala Lumpur in Civil Suit No. D4-23-2067-87 that is to say the sum of RM5,197 060.82 together with interest thereon at the rate of 17% per annum from 1 December 1986 until the date of realisation and costs at RM400 whereon execution has not been stayed or you must secure or compound for the aforesaid sum to the satisfaction of the said MBf Finance Bhd within 21 days of the date hereof and that the consequences of not complying with the requisition of this notice are that winding-up proceedings may be taken against you.
>
> Dated this 24 December 1988.
>
> Sgd. Messrs Cheang & Ariff
> Solicitors for MBf Finance Bhd.

That demand was served on the appellant on 27 December 1988. As the appellant failed to pay the debt as demanded, the respondent on l9 January 1989, presented a petition dated 17 January 1989, to wind-up the appellant on the ground that the appellant had failed to comply with a statutory demand and was therefore insolvent and unable to pay its debt. At the hearing in the High Court before Justice Dr. Zakaria bin Mohd. Yatim, several grounds were raised to resist the said petition. None of them found favour with the learned Judge who, after hearing arguments, ordered the appellant to be wound up.

On appeal to us, Mr. G. Sri Ram, leading Counsel for the appellant, contended firstly that the appellant ought not to have been wound up because the statutory demand did not comply with the terms of s. 218(2)(a) of the Act, which is as follows:

> 218(2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

Counsel contended that the demand was bad because under s. 218(2)(a), a company is by law entitled to have three weeks after service of the demand to either pay, secure or compound the sum demanded. He further submitted that a creditor is not entitled to truncate that right conferred by statute which requires strict compliance and stated that the appellant recognised the seriousness of the ensuing consequences as a presumption of insolvency arises upon a failure to meet the demand. In his written submission, Counsel relied on *Re Yap Kim Kee & Sons Sdn. Bhd.* [1990] 2 MLJ 108, in which case the High Court has held '*inter alia*' that although the demand in writing need not be in special form, it must comply strictly with the

requirements of s. 218(2)(a). Here we would agree with Zakaria J in that case that the demand in writing need not be in any special form as stated in *Palmer's Company Precedents* (17th Edn) at p. 26. The demand need not use the word "demand" and a peremptory "request" or "call" for payment would suffice. We would also agree with Zakaria J who cited and followed *Bateman Television Ltd.* v. C*oleridge Finance Ltd.* [1969] NZLR 794, in which case it was pointed out that the whole purpose of a demand is to warn the debtor of an impending petition.

Although the amount stated in the notice of demand in this case was not in dispute, Counsel for the appellant in his written submission also cited *Re Perusahaan Jenwatt Sdn. Bhd.* [1990] 2 MLJ 178, in which case Zakaria J held *inter alia* that the notice of demand must comply strictly with the requirements of s. 218(2)(a) of the Act. In that case, His Lordship held that the notice of demand had not complied strictly with the requirements of s. 218(2)(a) because the amount stated in the said notice was far in excess of the debt due and the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts. The High Court therefore held that the notice of demand was bad and that the Court could not presume that the company was unable to pay its debts. We note that Zakaria J has in that case reiterated what he has stated in the earlier case of *Re Yap Kim Kee & Sons Sdn. Bhd.* [1990] 2 MLJ 108 regarding the "statutory demand".

Counsel also relied on the Australian case of *Re Willes Trading Pty. Ltd.* [1977-78] 3 ACLR 582, in which case Needham J of the Supreme Court of New South Wales held '*inter alia*' that in order to attract the deemed insolvency advantages of s. 222(2)(a) of the Companies Act 1961 (New South Wales) (which is in *pari materia* with our s. 218(2)(a) of the Act), there must be strict compliance with that section. But Counsel also referred us to *Re Ataxtin Pty Ltd* v. *Gordon Pacific Developments Pty. Ltd.* [1991] 9 ACLC 865 and pointed out that it was stated by Heerey J in the Federal Court of Australia recently that there are conflicting authorities in Australia concerning the validity of a demand which overstates the amount due. As stated above, although the amount due was not in dispute in this case, we would nevertheless take this opportunity here to agree with Zakaria J that a demand does not fall within s. 218(2)(a) of the Act if the amount demanded exceeds the sum actually due.

Lastly Mr. Sri Ram referred us to the Indian case of *Parry & Co. Ltd*. v. *India Machinery Stores (P) Ltd.* [1979] 49 Company Cases 21, in which the Patna High Court held *'inter alia'* that the winding up of the company could not be allowed if the company had neglected to pay a part of the debt. In that case, the notice of demand under s. 434(a) of the Indian Companies Act 1956 (which is in *pari materia* with s. 218(2)(a) of our Companies Act) had been superseded by a letter written on 13 December 1976. It was also held by the Indian Court that as only a fortnight's time was allowed by that letter to the company to pay the dues which was against the statutory period allowed under the said s. 434, it could not be contended that the winding-up proceeding should be maintained on the basis of that letter. Counsel pointed out that the statutory demand in our present case gave the appellant 21 days from the date of the notice, that is 24 December 1988, and not 21 days after receipt by the appellant. He contended that since the demand was received by the appellant only on 27 December 1988, the appellant was not given the statutory three weeks but instead a shorter period to comply with the demand. He therefore submitted that that vitiated the demand. He also reasoned that since the demand was invalid, the presumption of insolvency did not arise and as the petition was based on a defective or invalid demand, a winding-up order on a presumptive basis ought not to have been made, and the learned Judge ought to have dismissed the petition on that ground. Counsel stated that learned Judge did not deal with

the question of the 21 days' notice because Counsel for the appellant in the Court below had conceded that point which was not quite correct. He therefore suggested that the case might be remitted back to the High Court for a ruling to be made on that point.

It must be pointed out that the petition in this case was presented more than two years ago and we would therefore now state that we consider that the demand was not bad or invalid. It was made in writing and was signed and delivered by the respondent's authorised agent at the appellant's registered address and it has specified the actual sum due which was not disputed. Section 218(2)(a) of the Act only provides that a demand under the hand of a creditor or under the hand of his agent lawfully authorised must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. The presumption of inability to pay its debts only arises if the requirements of the section relating to the demand have been complied with and the company has for three weeks after service of the demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. In other words the three weeks refer to the period of neglect to pay before the said presumption of inability to pay debts arises under the said section, and is not a requirement relating to the notice of demand itself. In this case, the respondent has stated incorrectly in the notice of demand that the debt must be paid within 21 days of the date of the notice but that in our view would not affect the validity of the demand to pay the sum due or was non-compliance with the requirements of s. 218(2)(a) of the Act. There would have been compliance with s. 218(2)(a) of the Act if the interval between the day when the notice becomes effective and the presentation of the petition is, as in this case, 21 full days (See *Re Catholic Publishing and Bookselling Co.* 33 LJ Ch 325 and *Re Lympne Investments Ltd.* [1972] 1 WLR 523).

As an alternative ground regarding insolvency, it was contended by Mr. Sri Ram that the learned Judge had applied the wrong legal test when he concluded that the appellant had not rebutted the statutory presumption and was therefore insolvent. Counsel said that in the Court below the appellant had led evidence to show that it is the owner of landed assets worth more than RM500 million. The respondent did not dispute those facts in the Court below and there was therefore no challenge on that point . Nevertheless the learned Judge relied on the decision of the Privy Council in *Malayan Plant (Pte) Ltd.* v. *Moscow Narodny Bank Ltd.* [1980] 2 MLJ 53, which held that the appellant had failed to show that it was not insolvent. Counsel submitted that the correct test would be met by answering a question: "Would the appellant be capable, if necessary, of paying all debts by a realisation of its assets, including any immovable property, and of carrying on some other business if its shareholders so wished out of the net amount realised after payment of all liabilities?". It was further submitted that it was no part of the test that a company should have the capability to meet its liabilities out of its own monies, and in support of that submission, the appellant relied on the decision of the Singapore High Court in *Re Great Eastern Hotel (Pte) Ltd.* [1989] 1 MLJ 161.

It was also submitted by Counsel that the *Malayan Plant* [1980] 2 MLJ 53 case is distinguishable from our present case in that in the *Malayan Plant* case, the appellant did not put its case on the same footing as the present appellant. It was not contended in that case that the "quick assets" test did not apply because the company had large landed assets. All that was contended for was that it would be more beneficial to all creditors if there were no winding-up of its assets. Alternatively it was also submitted on behalf of the appellant that if the Privy Council had laid down any general principles in that case to govern the test for insolvency, then to that extent its decision was wrong and that the Supreme Court should not follow it.

Mr. Loh Siew Cheang, leading Counsel for the respondent, submitted that the *Great Eastern Hotel (Pte) Ltd*. [1989] 1 MLJ 161 case could be distinguished as it was a decision of the Singapore High Court under s. 254(2)(c) of the Singapore Companies Act (Cap. 185 1970 Edn.) which is similar to s. 218(2)(c) of our Companies Act 1965, whereas in this case we were concerned with s. 218(2)(a) of the Act. He then referred us to the following passage in the judgment of Cotton LJ in *Imperial Hydropathic Hotel Co. Ltd.* v. *Hampson* 49 LT 147, 150:

> As regards the right to have a winding-up order, the first question is whether here the company is to be deemed unable to pay its debts. It was argued that we must be satisfied judicially that the company was in fact insolvent; but that is not what the Act of Parliament requires, as I understand it. s. 80 requires the Court to treat the company as if it were insolvent within the meaning of the previous section - that is, unable to pay its debts if certain things are done and the question we have therefore to consider is not whether we are satisfied on the evidence before us that the company is insolvent, but whether an event has happened, on the happening of which the Act of Parliament requires us to deem it insolvent - that is, to treat it as insolvent. The words are, 'A company under this Act shall be deemed to be unable to pay its debts when certain things happen. Now, the question here is, whether the company neglected for the statutory period to pay a debt which is now shown to be due; and, in my opinion, it did.

We ourselves have noticed that the Privy Council case of *Malayan Plant (Pte) Ltd.*v. *Moscow Narodny Bank Ltd.* [1980] 2 MLJ 53 was not referred to during arguments by the two Queen's Counsel who appeared before the Singapore High Court in the *Great Eastern Hotel (Pte) Ltd.* case [1989] 1 MLJ 161 for the reason that that case was concerned with s. 254(2)(c) of the Singapore Companies Act, and there is therefore no need for us to consider the two tests for insolvency referred to by the learned Judicial Commissioner in the Singapore case because under, s. 218(2)(a) of the Act, it is not necessary as in a case of a petition under s. 218(2)(c) of the, Act for the petitioner to prove to the satisfaction of the Court that a company is unable to pay its debts or for the Court in determining whether a company is unable to pay its debts, to take into account the contingent and prospective liabilities of the company. In this case, the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with "commercial insolvency", that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case and cite the following observations from *Buckley on the Companies Act* (13th Edn.) at p. 460:

> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Applying the test in the above-quoted observations, we therefore held that the learned Judge had exercised his discretion correctly in ordering the appellant to be wound up.

Mr. MS Murthi, the other Counsel for the appellant, after referring to that part of the learned Judge's grounds of judgment on the authority of one Song Soon Ong to instruct Messrs Cheang & Ariff to issue the notice of demand, stated that his authority was limited to RM750,000 relating to credit including leasing and hire purchase up to the authorised limit of RM300,000. He contended that the learned Judge was wrong to hold that the recital clause in Mr. Song's power of attorney gave him unlimited authority. Counsel then referred to *Re Kieran Byrne & Associates Geotechnical Consultants Pty. Ltd.* [1987-88] 12 ACLR 367, in which case the Supreme Court of Queensland held in a judgment delivered by Ryan J that as there was

no evidence that the applicant gave authority to its solicitors to sign the demand under s. 364(2)(a) of the Companies (Old) Code, the demand was defective and a winding-up order could not be founded upon it. And Mr. Murthi then stated that Mr. Song Soon Ong's authority was limited and that there was no evidence in writing that he was so authorised by the respondent to instruct the solicitors to issue the notice of demand.

Counsel also contended that the power of attorney granted to Mr. Song could not be extended by a document not under seal and merely extended, and the instruction to solicitors to act in the matter was *ultra vires* and therefore the notice under s. 218 was bad and the statutory presumption could not arise and the respondent had no cause of action to present the petition. Mr. Loh however contended that it was irrelevant to consider the authority of the solicitors to issue the notice of demand in this case as Mr. Murthi in his arguments had assumed that the solicitors were employed by Mr. Song who was only an employee of the respondent. He stated that the factual errors in Mr. Murthi's arguments were that Mr. Song did not sign the notice which was signed by the solicitors on behalf of the respondent. The notice itself has clearly stated that Messrs Cheang & Ariff were solicitors for the respondent which was the petitioner and in none of the affidavits affirmed by Mr. Song did he say that he had acted under power of attorney granted to him by the respondent, nor did Mr. Song in any of his affidavits state that his acts in this case were his personal acts and not acts on behalf of his employer, the respondent. Counsel contended that the learned Judge had looked at the entire chain of evidence and in his grounds of judgment at p. 22 of the supplementary appeal records had stated that whatever written instruction Mr. Song had received from the respondent was an internal matter within the company. His Lordship also referred to Mr. Song's affidavit affirmed on 12 June 1991, in which he had stated that "the petition and all affidavits were filed by or for and on behalf of the petitioner ... All the affidavits on behalf of the petitioner have been issued or undertaken or made with and under the petitioner's authority". Mr. Song has also confirmed that the notice issued under s. 218 of the Companies Act, 1965, including the petition itself which is signed by the petitioner's solicitors for and on behalf of the petitioner were acts which have been undertaken with and under the authority of the petitioner. His Lordship accepted the averment of Mr. Song that the notice of demand was issued by Messrs Cheang & Ariff with the authority of the respondent.

This Court has recently pointed out in *William Jacks & Co. (M) Sdn. Bhd.* v. *Chemquip (M) Sdn. Bhd.* [1991] 1 CLJ (Rep) 492 that where there is no evidence that there is no action properly before the Court, it could determine the issue of want of authority of a solicitor on an application by motion or summons. However, in this case the learned Judge has dealt with this issue during the hearing and we would agree with him that there was ample evidence in this case to show that Messrs Cheang & Ariff were lawfully authorised to act on behalf of the respondent. We agreed with Mr. Loh that the submissions of Mr. Murthi on Mr. Song's authority and his power of attorney as well as the authority of the solicitors to issue the notice of demand were irrelevant to the issue before the Court. We therefore ordered that the appeal be dismissed with costs and that the deposit be paid to the account of taxed costs.

Also found at [1992] 1 CLJ 637